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IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-681

DONALD WALLACE, MICHAEL McLAUGHLIN, *et al.*,

*Petitioners,*

*v.*

MICHAEL KERN, THE LEGAL AID SOCIETY, THE PEOPLE OF THE CITY AND STATE OF NEW YORK, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT LEGAL AID SOCIETY

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT LEGAL AID SOCIETY

### The Question Presented

Did the United States Court of Appeals, in a ruling which is in accord with the unbroken authority of six Circuit Courts and twelve District Courts, err in holding that a private defender organization, which is in no manner under state or city supervision or control, and which,

in defending indigents in the state courts, performs a function normally performed by private counsel, is not subject to suit and federal court supervision under 42 U.S.C. §1983?

## Statement

The petition herein seeks to review an order of the United States Court of Appeals for the Second Circuit which unanimously reversed a preliminary injunction entered against The Legal Aid Society of New York City (the "Society"). The injunction, made in three consolidated actions brought in the Eastern District of New York pursuant to 42 U.S.C. §1983, among other things, restrained the Society from accepting or acting upon additional assignments of felony cases in the Supreme Court of Kings County, New York, so long as the average caseload of its trial attorneys in such Court exceeded 40, and subjected the Society to continuing federal court supervision concerning its acceptance of new assignments in the state criminal court.

The petitioners in this case have formulated an abstract question resting on a premise which is unsupported by the facts established below. Thus, the petitioners ask this Court to determine whether the federal courts "have the power, pursuant to 42 U.S.C. §1983, to enjoin violation of constitutional rights that arise from the improper conduct of public or governmental functions, where those functions have been delegated to agencies that are nominally private in nature." (P. 2)*

No such question is presented by the facts of this case. The record below, upon which the Second Circuit based its

* References are to the Petition for Certiorari.

decision, demonstrates that 1) the Society performs not a public or governmental function, but a function which has traditionally been performed by the private bar; 2) that the Society's only obligations are to the clients it defends, and that the very essence of its role as assigned defense counsel is to oppose the State, which it does with vigor; and 3) that, as the trier of the fact found, the Society's "attorneys compare favorably with private attorneys both in quality of their work and in their results." (P.16a)*

The Society has long been regarded as the very model of an effective and independent legal defense organization; and petitioners offered no proof, and the trier of the fact made no finding, to the contrary. If, as the petitioners urge, the Society can be said to perform a public or governmental function, then every private attorney who accepts an assignment from the state court to defend an indigent can be subjected to liability and supervision by the federal courts under Section 1983.

On the facts before it, the Second Circuit unanimously ruled that the Society's representation of indigents was not action "under color of state" law within the meaning of Section 1983, and that it was inappropriate for the federal court to exercise supervision over the Society's docket in the state court. The result was consonant with the decisions of eighteen other courts which have considered the status of independent legal service organizations under Section 1983. A contrary decision could not be justified by the proof in this case and would have per se subjected the Society and other assigned private counsel in the state criminal courts to continuous regulation, on a day-to-day

* References are to the Appendix to the Petition for Certiorari.

basis, by the federal courts with respect to their assignments; thrown open the doors of the federal courts to countless actions for damages under Section 1983 against assigned counsel by clients in the state court dissatisfied with the results in their case; and intruded deeply both on the power of the state courts to make assignments to provide the most effective representation of indigents, and on the authority of a private defender organization to manage its own affairs and to discharge its obligations to its clients free from interference by either state or federal officials.

The Second Circuit decision was clearly correct. Petitioners' quarrel is with the facts, which demonstrate the Society's independence. There is no issue of law to be brought before this Court.

## The Proceedings Below

The three actions in which the preliminary injunction was entered were commenced by inmates in the Brooklyn House of Detention then awaiting trial on felony charges. The first of the actions, *Wallace, et al.* v. *Kern, et al.*, named as defendants all of the judges of the Kings County Supreme Court, other Court personnel, and the Kings County District Attorney. The Society was not a defendant. The complaint sought, among other things, an effective speedy trial rule, a declaration that the defendants' practices violated the Constitution, and an injunction requiring defendants to accord all indigents in state court their constitutional right to effective representation.

Postponing consideration of the request for an effective speedy trial rule, the Court proceeded to hold evidentiary

hearings limited to petitioners' application for preliminary relief against the judicial authorities, directing them to afford indigents more adequate representation in the state court. These hearings were later consolidated with hearings in the *pro se,* independently commenced *McLaughlin* actions, which named the Society as a defendant and sought similar relief.

Extensive proof was offered at the hearings concerning the cause of the calendar congestion in Kings County and the conditions under which the Society was required to labor. But no proof was offered by petitioners to support their contention here that the Society was subject to state or city control and all of the evidence confirmed that the Society is managed independently and that its attorneys' only duty is to their clients.

## The District Court's Findings and Injunction

The District Court's principal opinion, filed simultaneously with its preliminary injunction against the Society, reflected a deep and justifiable concern over the then calendar conditions in the criminal courts in Kings County, a concern which the Court of Appeals shared. The District Court found that the criminal parts of the Supreme Court in Kings County were in a "state of deep crisis," attributable in large part to a "dramatic increase" in indictments without a corresponding increase in trial parts and other judicial resources. With the courts unable to try the burgeoning number of indictments, defendants often languished in jail for 12 to 15 months awaiting the trial of their cases.

In seeking relief under Section 1983 against the Society for the calendar conditions in the Kings County Supreme Court, the petitioners chose the wrong party, the wrong relief, and the wrong forum. As a private organization, the Society has and had no power to provide the additional judges and supporting facilities necessary to afford defendants their right to a fair and speedy trial.

The District Court was desirous of providing some relief for the crisis in the state court but, mindful of "a federal court's limited power," and in "the interests of comity," concluded that it should limit itself at the preliminary injunctive stage to relief against the sole private defendant, the Society.* Consequently, the Court could focus only on one of the effects, not the cause, of the calendar paralysis in Kings County—the backlog of immobilized cases assigned to the Society's attorneys. The Society had increased its staff in Kings County from 16 attorneys in December of 1971 to 57 by June of 1973. It had also filed numerous applications for speedy trial, and pressed appeals on this issue to the New York State Court of Appeals. But increases in the Society's staff and motions in individual cases could not eliminate the bottleneck of too few judges and courtrooms for too many cases, and the inventory of frozen cases awaiting trial remained.

The District Court found that there was no evidence that the Society was responsible for the log-jam, that any Legal Aid attorney was failing to do his best under existing circumstances (P. 7a), or that representation on an

* The District Court also enjoined the Court Clerks from failing to calendar *pro se* motions brought by indigent defendants. This aspect of the decree was also vacated by the Second Circuit, but it was not brought before this Court by petitioners. (P. 10, n. 5)

actual trial had failed to meet traditional standards of effective assistance of counsel (P. 27a). Indeed the District Court specifically found that "Legal Aid attorneys compare favorably with private attorneys both in quality of their work and in their results" (P. 16a).

Nevertheless, the Court ruled that in considering prospective injunctive relief under §1983, the "adequacy of representation by The Legal Aid Society may be measured by a different standard" than that utilized in post-trial *habeas corpus* petitions based on denial of Sixth Amendment rights to effective counsel (P. 30a). The Court found that prospective standard in the provisions governing "effective assistance of counsel" in the American Bar Association's *Project on Standards for Criminal Justice—The Defense Function* (1970). In so acting, the District Court also disregarded this Court's reluctance to lay down uniform prospective rules to govern Sixth Amendment rights. *E.g., Chambers* v. *Maroney,* 399 U.S. 42 (1970).

Measuring the Society against the ABA's *Standards,* and stressing the large number of cases awaiting trial, the Court concluded that "the overburdened, fragmented system used by Legal Aid does not measure up to the constitutionally required level" (P. 32a).

The relief which the Court fashioned fixed an average caseload of 40 for each of the attorneys assigned to the trial parts of the Supreme Court, and it added a requirement that new assignments could not be undertaken without the professional certificate of the local Brooklyn office chief. In such respect, the Court intruded deeply into the Society's internal affairs, shifting responsibility from its officials to the federal court for determining the staffing

needs of the Society in state court. To the extent that the Society was to be consulted on the subject, the Court bypassed the Society's principal officers, and lodged responsibility in the local office in Kings County to certify whether the Society could undertake further cases there.

Having postponed consideration of petitioners' request for a speedy trial rule, and choosing to grant relief only against a private organization with no power to command public resources for the courts, the District Court's order failed to act upon the heart of the crisis in the administration of justice in Kings County—the delay which pervaded all aspects of the criminal process there—even though it recognized that it would have to modify its injunction against the Society if "defendants did not stay in jail as long" (P. 35a). But the failure of cases to proceed to trial was not the result of caseloads of the Society, but of the lack of sufficient trial parts to keep up with the indictments. The decision did not and could not create one additional trial part, or advance the day on which a single case could be heard. The only effect of the injunction was to direct the division of the same quantity of the stacked-up cases for which trial parts did not exist among a greater number of lawyers.

The relief granted by the District Court was worse than cosmetic. Because of its unwillingness to act against the public officials who control the funding for assigned counsel, the District Court took no steps to assure that qualified private counsel would be available to provide representation for indigents whom the Society was barred from representing, and it rejected the prayer by the *Wallace* plaintiffs that the State be directed to provide the Society

with additional funds to increase the number of attorneys. Thus, the District Court's preliminary injunction had the unintended effect of relegating indigents to representation by private attorneys drawn from a panel who all witnesses agreed were not as effective and diligent as the Society's attorneys, and who could be paid only nominal fees for their services. And the ultimate irony was that these attorneys, who had to combine their private practices with their assigned cases, were in no way subject to the District Court's caseload limitation.

In granting the injunction, the District Court departed from an unbroken long line of decisions holding that independent defender organizations are not engaged in "state action" within the meaning of Section 1983. Its injunction, if upheld, would have had the effect of saddling the Society with mechanical and arbitrary caseload limitations stated as constitutional imperatives. If upheld, the order would also have required the Society, and all assigned defense counsel, to divert scarce resources to defending a flood of §1983 lawsuits seeking damages.

On the record before it, the Court of Appeals properly reversed this preliminary injunction, leaving it to the Society and its attorneys to make the professional judgment as to the number of cases that they could effectively handle. Subsequent to the Court of Appeals' decision, the Society created a formal mechanism to insure that it would not accept assignments which it could not effectively discharge, a matter which it had always attempted to assure by less formal methods.* At the same time, the number of indict-

* The question of the existence of a possible professional case overload is to be determined by a panel consisting of the Dean of Columbia Law School and the Presidents of the State and City Bar Associations. This mechanism was incorporated into an agreement with the Society's attorneys.

ments in Kings County has dropped and the average caseload handled by the Society's attorneys there is well below that set by the District Court. The question of caseload is, therefore, essentially moot.

## ARGUMENT

### I

**The Circuit Court decisions are unanimous in support of the rule followed below that a private legal services organization "in no manner under State or City supervision or control," which performs a function "normally performed for and by private persons" does not act under color of state law within the meaning of Section 1983.***

Petitioners misconceive the function of assigned counsel when they state that they perform "public or governmental functions."

An attorney or defender organization which provides legal representation to a defendant in a criminal prosecution brought by the State owes his duty to his client, not to the State. His responsibility is to oppose the will of the

* The quoted words in this heading are from the decision of the Court of Appeals for the Second Circuit in *Lefcourt* v. *Legal Aid Society*, 445 F. 2d 1150 (2d Cir. 1971), at 1157, 1156. The *Lefcourt* decision, made after a meticulous review of the status of The Legal Aid Society, rejected the plaintiff's contention there that the Society acted "under color of" state law. The Court of Appeals in its decision herein found it necessary only to cite *Lefcourt* to reverse the order of the District Court. Although petitioners here assert that it is "noteworthy" that "public support for the Legal Aid Society, official influence over its policies, and its intimate involvement in criminal justice planning have all increased dramatically since *Lefcourt* was decided" (P. 16, n. 8), there is no indication in the record to that effect and the relevant facts are to the contrary.

State with every ethical and professional means at his disposal. Such action, whose very essence is adverse to the State, and which has traditionally been provided by private members of the bar, cannot be converted into "state action." Similarly, petitioners cannot find any support in the record herein for their contention (P. 16) that the State has "significant control" or "official influence" over the Society, or that the State's "intimate involvement" with the Society and its alleged "collaborat[ion]" with the Society "in planning or policy decisions" is such as to make the Society a state agent within the meaning of §1983.

**"Public Function"**

Petitioners contend that the representation of an indigent defendant by a court-appointed attorney or defender organization constitutes the performance of a "public" or "essential state function" within the line of cases represented by *Evans* v. *Newton*, 382 U.S. 296 (1966), *Smith* v. *Allwright*, 321 U.S. 649 (1944) and *Terry* v. *Adams*, 345 U.S. 461 (1953). This contention, that a private attorney becomes a state agent merely by acceptance of an appointment to defend an indigent, has been rejected by the unanimous authority of the federal courts in decisions of at least six Courts of Appeals and twelve District Courts. These cases have recognized that counsel for an indigent defendant is not an agent of the State whose responsibilities are to the State, but an attorney whose sole duties are to his client. The rationale underlying this principle was cogently set out by the Second Circuit in *Lefcourt*:

> "* * * the representation of persons accused of crimes, far from being the function of any agency which 'traditionally serves the community' is normally performed

> for and by private persons. Those who can afford their own counsel value the fact that their relationship with their attorney will be protected by the Courts through the attorney-client privilege. The person with a retained attorney knows that that attorney will use his best efforts consistent with ethics and law, and that no State official is in a position to alter this in any way. The City has sought to have the Society function under similar circumstances. Under the contract, the City retains few controls over the Society, and *the Society's obligation under the contract is to its clients and not to the City.*" 445 F. 2d at 1156 (emphasis supplied).*

The Second Circuit in *Lefcourt* also recognized that the duty of an attorney to oppose the State cannot be converted into state action on the theory that the State is *required to defend* indigent prisoners. As the Circuit there stated, it is the duty of the State not to defend an accused it is trying to put in jail, but to provide the means for a defense for those who cannot afford private counsel. No decision of this Court has implied otherwise.

Every other Circuit which has considered the status under Section 1983 of private and public defender organizations, as well as assigned counsel, has reached precisely

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* Petitioners try to distinguish *Lefcourt* (P. 15-16), and they contend that the Second Circuit, in its decision herein and in its unanimous refusal to rehear this case *en banc*, mistakenly relied on its own earlier opinion. Undoubtedly, the Court of Appeals understood its own prior decision as well as the clear distinction between *Lefcourt* and *United States* v. *Wiseman*, 445 F. 2d 792 (2d Cir. 1971), *cert. denied*, 404 U.S. 967 (1971), which held that the signing of a false affidavit of service of process by a process server was within "the narrow class of cases where state action can be found on the basis" of the "public function" theory. In *Wiseman* the Second Circuit specifically said: "*Unlike most functions involved in the conduct of a lawsuit by private parties*, the service of summons is essentially and traditionally a public function." 445 F. 2d at 796 (emphasis supplied).

the same conclusion. In *Espinoza* v. *Rogers*, 470 F. 2d 1174 (10th Cir. 1972), an action brought against Colorado public defenders, the Tenth Circuit found that a public defender's professional duties and responsibilities toward his client are the same as those of all other attorneys, and that public defenders in the office of the Colorado State Public Defender do not act under color of state law so as to be amenable to suit under Section 1983. In *French* v. *Corrigan*, 432 F. 2d 1211 (7th Cir. 1970), *cert. denied*, 401 U.S. 915 (1971), and *Mulligan* v. *Schlachter*, 389 F. 2d 231 (6th Cir. 1968), attorneys appointed by the state court to represent indigent defendants were held to have been appointed solely to serve the interest of the client, and thus not acting under color of state law.* Similarly, in *Thomas* v. *Howard*, 455 F.2d 228 (3d Cir. 1972), the Third Circuit concluded that an attorney appointed by the Court could not be sued under Section 1983. The Court ruled that, since the attorney was "* * * performing his duties solely for [his client], to whom he owed the absolute duty of loyalty, as if he were a privately retained attorney * * * [he] was not acting 'under color of state law, custom or usage' within the meaning of the Civil Rights Act * * *." 455 F. 2d at 229-30 (citations omitted).**

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* See also *Szijarto* v. *Legeman*, 466 F. 2d 864 (9th Cir. 1972) (attorney, whether retained or appointed, does not act under color of state law); *United States* v. *Senak*, 477 F. 2d 304 (7th Cir. 1973), *cert. denied*, 94 S. Ct. 157 (1973), where the defendant public defender was indicted under 18 U.S.C. §242 on the ground that he had used his position to extort fees from the poor; the District Court had summarily dismissed for failure to show state action and the Seventh Circuit remanded for a factual hearing to determine the conditions which attached to the defendant's appointment as a public defender and the representations he made to his clients to exact fees from them; the "essential state function" theory was not relied on.

** The same conclusion—that defender organizations are not subject to Section 1983 since they do not act under color of state law—has been reached by the District Courts in a variety of suits brought

**Petitioners attempt to belittle this line of authority, suggesting that there is a more permissive standard of jurisdiction under Section 1983 for injunctive relief than for damages (P. 15). But the touchstone of liability for both injunctive relief and damages under Section 1983 is the same: Was the defendant acting "under color of state" law? Since the Society was not performing a "public function" in defending its clients, there is no basis for an action against it under Section 1983.**

**"Involvement With the State"**

After taking lengthy testimony subsequent to its initial order denying the Society's motion to dismiss for failure

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against attorneys under Section 1983, including a recent decision in an action strikingly similar to the instant case: *Gardner* v. *Luckey*, —— F. Supp. —— (M.D. Fla., Jan. 24, 1973, No. 71-561 Civ. T-K). There, plaintiffs, in an action under Section 1983 against the Public Defenders for two judicial circuits for failure to provide adequate representation, sought, among other things, a caseload limitation. Although the office of public defender was created by statute, and funded by the state, the Court held that those facts did not "endow such public defenders with the color of state law in representing their clients * * * nor immediately transform an attorney-client relationship into state action" (Opinion, p. 6). The Court concluded: "An attorney for an indigent defendant, whether court-appointed or a public defender, is not an officer or servant of the state. His duty is to *oppose* the efforts of the state to convict his client. His actions, good or bad, are not done for the state nor under color of any statute." (*Id.*, pp. 4-5) (emphasis in original). *See also*: *United States ex rel. Wood* v. *Blacker*, 335 F. Supp. 43 (D.N.J. 1971); *Pugliano* v. *Staziak*, 231 F. Supp. 347 (W.D. Pa. 1964), *aff'd per curiam*, 345 F. 2d 797 (3d Cir. 1965); *Wardrop* v. *Ross*, 319 F. Supp. 1299 (W.D. Pa. 1970), *aff'd per curiam*, 432 F. 2d 1049 (3d Cir. 1970); *Palermo* v. *Rockefeller, et al.*, 323 F. Supp. 478 (S.D.N.Y. 1971); *Wood* v. *Virginia*, 320 F. Supp. 1227 (W.D. Va. 1971); *Peake* v. *County of Philadelphia*, 280 F. Supp. 853 (E.D. Pa. 1968); *Vance* v. *Robinson*, 292 F. Supp. 786 (W.D.N.C. 1968); *Brown* v. *Duggan*, 329 F. Supp. 207 (W.D. Pa. 1971); *Reinke* v. *Richardson*, 279 F. Supp. 155 (E.D. Wisc. 1968); *Christman* v. *Pennsylvania, et al.*, 275 F. Supp. 434 (W.D. Pa. 1967), *cert. denied*, 393 U.S. 885 (1968); *Jackson* v. *Hader*, 271 F. Supp. 990 (W.D. Mo. 1967).

to show "color of state law" (which assumed petitioners' facts to be true), the District Court did not make a single finding supportive of petitioners' contention that the Society's "involvement" with the State makes it an agent thereof. The Court of Appeals, which had carefully "sifted the circumstances" and had reviewed the contacts between the State and the Society in the *Lefcourt* case, obviously rejected petitioners' contention that state "implication in" or "involvement with" the work of the Society transforms private conduct into state action. Yet petitioners again contend here, without any factual support, that the "affinity between the Legal Aid Society and the State" (P. 7) is such as to make the Society a state agent within the *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), line of authority.

As record support for the asserted "affinity" between the Society and the State, petitioners rely on New York State law, which requires the provision of defense counsel for accused indigents, and the contract between the City of New York and the Society under which the Society has undertaken to provide such representation. Petitioners also rely on the fact that various governmental agencies (state, city and federal) supply a very large percentage of the Society's operating funds, and that the Society's personnel serve on planning boards and have "regularly engaged in meetings with state and city officials regarding policy" (P. 8).

But the contract with the City recognizes explicitly that the Society "shall alone be responsible for their [its attorneys', investigators' and other employees'] work, and the direction thereof," and judgment as to staffing and handling

cases is left exclusively to the Society. Under its contract with the City, the Society has been the model of a private defender organization free from all vestige of state supervision and control, as this Court well knows from the number of cases the Society has brought before it.*

Similarly, petitioners confuse funding with control. By seeking and obtaining funds from the City, the Society does not submit to the control of its affairs—any more than the government controls our great private universities. See *Grafton* v. *Brooklyn Law School,* 478 F. 2d 1137 (2d Cir. 1973); *Grossner* v. *Trustees of Columbia University in the City of New York,* 287 F. Supp. 535 (S.D.N.Y. 1968). The Society has made continuing efforts to insure that its need for funds does not compromise its independence, and to this end it has expended millions of dollars of privately raised money on its criminal defense efforts.

The plaintiff in *Lefcourt* v. *Legal Aid Society,* who attempted to make a record which would show state control over the Society, wholly failed to do so. The plaintiff there, the Second Circuit concluded, had not established "that the City or any other governmental subdivision or agency had any right whatever to intervene in any significant way with the affairs of the Society with respect to its employment practices or otherwise." (445 F. 2d at 1155.) It further found that: "It cannot be said that the Society acts under

* In addition, the Society has now, or has had within the last year, lawsuits pending against the Governor, the Mayor, the Presiding Justice of the Appellate Division, Second Department, all the Judges of the Criminal Court of the City of New York, all the Justices of the Supreme Court of the State of New York authorized to sit in the First Department, the Police Commissioner, the Commissioner of Corrections of the City of New York, the Commissioner of Corrections of the State of New York, and numerous other public officials.

color of State law by virtue of the financial and other benefits which it receives from the City and various other governmental agencies, courts and subdivisions, since there has been no sufficient showing of governmental control, regulation or interference with the manner in which the Society conducts its affairs." (*Ibid.*) The petitioners in this case failed even to attempt to make a record below which would show state control over the Society, and their failure to do so makes it particularly inappropriate to grant certiorari in this action.

The emptiness of petitioners' claim of state action is best illustrated by their contention that the Society's involvement in "the planning and administration of the Criminal Term of Kings County Supreme Court" (P. 9) has compromised its independence. Petitioners cite such acts as participation in meetings and study groups for court reform under the auspices of the State Judicial Conference and the Appellate Division. If, as petitioners argue (P. 8-9, 13-14), it is "state action" to argue that the Supreme Court be kept open in the summer, and to offer to maintain Legal Aid parts at full staff; or to plead for more public funds so as to be able to hire more attorneys; or to urge that cases with retained counsel not be assigned to the Legal Aid parts; or to discuss techniques for disposing of more felonies at the Criminal Court level; or to seek to persuade the District Attorney to reduce bail demands; or to serve on a committee to recommend methods to alleviate overcrowded conditions in the jails; or to attempt to work out with the Appellate Division mechanics for bringing on speedy trial motions; or to devise methods for improving the continuity of representation of indigents

and for keeping track of Legal Aid cases after indictment—then every defense lawyer who seeks to promote the goal of a fair and speedy trial for his clients is vulnerable to an attack on his independence. The Society's continuing advocacy of reform—which petitioners see as proof of collusion—is in reality the best evidence of the Society's devotion to the interests of its clients. The record below fully supports the Second Circuit's conclusion in *Lefcourt* that:

> "Although the Society by contract has undertaken to make available to indigents legal services which otherwise governmental agencies might have to assume, its history, constitution, by-laws, organization and management definitely establish that it is a private institution in no manner under State or City supervision or control. *Its very independence from any such control is an assurance that those who receive the benefits of its services will obtain these services in accordance with the highest standards of the Bar.*" (445 F. 2d at 1157; emphasis supplied).

In sum, all of the lower courts which have considered the issue have concluded that assigned defense attorneys, who act independently and for the good of their clients, are not subject to suit under Section 1983. *Compare United States* v. *Senak, supra.* In this case, the record attests to the Society's independence and devotion to the interests of its clients. Indeed, the District Court specifically found that there was no evidence that the Society's attorneys were failing to do their best under the circumstances. There is, therefore, no legal issue in this case for this Court to consider.

## II

**Review of this case is not timely since the real issues of trial delay remain to be tried against the state agents who can provide the necessary resources to vindicate petitioners' rights.**

The District Court's order in this action enjoined the Society from accepting further assignment of felony cases in Brooklyn Supreme Court so long as its attorneys' average caseload exceeded 40. In imposing a caseload limitation on the Society, the Court resorted to a novel remedy, not binding on other assigned counsel, with which the Court held the Society's attorneys compare favorably. It is not surprising therefore that the consequence of the decision below was to assign the representation of indigents to private attorneys who are not subject to any caseload limitation, who work without the supervision available to the Society's attorneys, and who are not adequately compensated for their time under state law. Every witness asked to compare the Society with private attorneys appointed under Article 18-B of the New York County Law expressed a preference for the Society.*

While asking this Court to review a wholly hypothetical question, petitioners are silent on the consequences of the actual injunction which the Second Circuit vacated. They now argue that as an abstract matter a failure of this Court to reverse the order of the Second Circuit would "deprive petitioners of the possibility of meaningful relief to vindicate their Sixth Amendment rights" (P. 18). As

* See, *e.g.*, pp. 125, 232, 297, 381 of the transcript of the *Wallace* hearings; pp. 311, 312, 669, 721 of the transcript of the *McLaughlin* hearings.

an even more abstract matter, petitioners contend that the order below leaves all indigent defendants "without an effective remedy" (P. 19), and they even state the only effective remedy would be one which gives the federal courts power to enjoin both "the public and the private participants in criminal justice administration" (P. 19).*

The actual facts of this case show how groundless these contentions are. The decision of the District Court did not, in actuality, further the right to counsel in Kings County, and the decision of the Circuit Court did not in any way impair that right. The interest to be vindicated herein was the right of indigents to effective representation. That right was not protected by an order which only enjoined defense counsel from representing clients and relegated indigents to a panel of private attorneys which was straining to discharge its limited responsibilities even before the District Court's order. It must be emphasized in this regard that the District Court did not find that a single Legal Aid attorney was not doing his best under the circumstances, and that since the injunction was dissolved the Society's caseload in Kings County has dropped well below the limit set by the District Court.

Petitioners' request—which the Society supports on behalf of its clients—for injunctive relief against trial delay in Kings County is still pending and demonstrates the fallacy in petitioners' claims that they have no effective remedy in this case. The real issues remain to be tried,

* Petitioners contend that "The ruling below draws an artificial distinction between the public and private participants in criminal justice administration" (P. 19). Even if this were so, and it is not, it is the same distinction drawn by the Constitution and 42 U.S.C. §1983.

and all of the relief necessary to vindicate petitioners' rights to a speedy and fair trial with effective assistance of counsel can still be granted by relief against the remaining defendants. Thus, even if there were any substantial legal questions presented by the Petition—which there are not—the entire case is not before this Court, and this Court should not act on the basis of a partial record on a preliminary injunction motion.

## Conclusion

**The Circuit Court's order is a proper application of principles laid down by the decisions of this Court and is consistent with authority in every other Circuit which has considered the matter. In addition, the order does not preclude the formulation of effective relief to vindicate petitioners' Sixth Amendment rights. Thus, the Petition does not raise any substantial question meriting consideration by this Court. Moreover, the essential mootness of the issues presented herein makes this an inappropriate case in which to grant a writ of certiorari. The Petition should be denied.**

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